No. 92-1691

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

Supreme Court, U.S.
FILED
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CONSOLIDATION COAL COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and
UNITED MINE WORKERS OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Respondent, the United Mine Workers of America, does not agree with Petitioner's statement of the question presented. Properly, the sole question presented is as follows:

> Whether the National Labor Relations Board's determination that the United Mine Workers of America needed certain information for the proper performance of its duties as the collective bargaining representative has support in the record and a reasonable basis in law?

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OPINIONS AND JUDGMENTS DELIVERED IN COURT BELOW

Petitioner seeks review of *Consolidation Coal Co. v. NLRB*, 986 F.2d 1408 (3rd Cir. 1993), which denied review of, and ordered enforced, the National Labor Relations Board's Decision and Order in *Consolidation Coal Company and United Mine Workers of America,*

International Union and United Mine Workers of America, District 4 and Their Local Unions No. 6321 and 1980, 307 NLRB 13 (No. 6-CA-22722, Apr. 14, 1992).

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Sections 158 (a)(1) and (a)(5), 29 U.S.C., provide "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of (employee) rights (and) to refuse to bargain collectively with the representatives of his employees."

COUNTERSTATEMENT OF THE CASE

In 1984, Consolidation Coal Company (hereinafter referred to as "Consol") built Bailey Mine No. 1 as a new coal mine in Greene County, Pennsylvania. App. 20a [1] (*Consolidation Coal Company and United Mine Workers of America, International Union and United Mine Workers of America, District 4 and Their Local Unions No. 6321 and 1980*, 307 NLRB No. 13, slip op. at 3 (No. 6-CA-22722, Apr. 14, 1992)). Consol created a wholly-owned subsidiary, Consol Pennsylvania Coal Company (hereinafter referred to as "Consol of Pennsylvania"), to operate Bailey No. 1. *Id.* Shortly before that mine opened in late 1984, Consol began work on a companion mine physically connected to Bailey No. 1 which it initially referred to as Bailey No. 2. App. 21a.

On February 1, 1988, Consol and the United Mine Workers of America (UMWA) entered into a collective

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[1] The designation App. followed by a number refers to the page in Petitioner's Appendix where the evidence appears.

bargaining agreement covering terms and conditions of employment of miners represented by the UMWA. App. 16a (1988 National Bituminous Coal Wage Agreement, Art. I) ("1988 NBCWA" or "1988 Agreement"). The 1988 Agreement provides that 1) employees laid off because of a reduction in work force shall be placed on panel or recall lists from which they shall be returned to employment on the basis of seniority, App. 17a-23a (1988 NBCWA, Art. XVII (d), (k)); and 2) the first three of every five jobs at a new Company operation shall be filled from the panel lists. *Id.*, Art. IIA.

In addition, the 1988 Agreement establishes a four-step grievance procedure, with the final step consisting of final and binding arbitration, for the resolution of differences between the employer, the UMWA and employees as to panel right disputes, *id.* And, the contract imposes on Consol and the UMWA an affirmative duty to disclose fully to each other the facts upon which they rely during the grievance procedure. Art. XXIII (c), IIA (6); and 2) Art. XXIII (c), (e), IIA (6).

On March 14, 1990, Consol of Pennsylvania transferred its Bailey No. 2 coal mining federal permit to the newly-created Enlow Fork Mining Company. App. 22a. Company spokesman, Paul Kverdweris, informed the Washington, Pennsylvania, *Observer-Reporter* of the opening of the Enlow Fork Mine in Greene County, Pennsylvania, and that newspaper dutifully reported the mine opening. App. 23a.

On April 16, 1990, UMWA District 4 President Edward Yankovich, Jr. requested certain information from Consol in order to determine whether employees at the Bailey and Enlow Fork mines were being hired in accordance with the recall rights provisions of the 1988 Agreement.

Consol refused the UMWA's request.[2] App. 24a. On April 18, 1990, in an attempt to ascertain the relationship between Consol, on the one hand, and Consol of Pennsylvania, Enlow Fork Mining Company, and Consol's other subsidiaries/affiliates, on the other, UMWA and District 4 representatives Barnhart and Yankovich wrote Consol asking for specific information concerning Consol and its apparently affiliated entities. App. 23a.

On April 19, 1990, members of UMWA Local 6321 filed a grievance claiming that Consol and its subsidiaries/affiliates had violated the 1988 Agreement by refusing to recognize employee panel rights. App. 25a. During the first three steps of the grievance procedure, the UMWA continued to request the information concerning Consol's relationship to its subsidiaries and affiliates. Consol refused to provide the UMWA with the requested information while the grievance proceeded through the grievance procedure, claiming that the information was not relevant because the Bailey 2 mine was controlled by Consol of Pennsylvania. App. 24a.

On May 21, 1990, the UMWA filed a charge with the National Labor Relations Board (hereinafter referred to as "NLRB") alleging that the Consol was engaging in an unfair labor practice by refusing to provide the information the UMWA requested prior to and during the grievance proceedings in violation of § 8(a)(1) and (5) of the National Labor Relations Act ("NLRA" or "the Act"), 29 U.S.C. § 158(a)(1) and (5).

On July 17, 1990, the Regional Director of NLRB Region 6 issued a complaint and notice of hearing alleging, *inter alia,* that Consol was in violation of § 8(a)(1) and (5) of the Act by failing to provide the requested information. App. 14a.

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[2] The Union's information request was directed at all times to Consol, the contractual signatory.

On September 11, 1991, the Administrative Law Judge to whom the UMWA's May 21, 1990, NLRB complaint had been referred, ruled that Consol had violated Sections 8(a)(1) and (5) of the NLRA, by refusing to provide the UMWA with the requested information. Specifically, the Administrative Law Judge found that there was a reasonable basis for the requested information "concerning the single, joint employer or alter ego relationships and that the information is relevant to a determination of whether [Consol] violated the contract." App. 43a.

On April 14, 1992, the NLRB adopted the Administrative Law Judge's decision and ordered Consol to 1) provide the UMWA with the information requested in its April 18, 1990, letter; and 2) to cease and desist from interfering with and restraining employee rights in any like manner by failing and refusing to furnish the Union with the information. App. 8a-9a.

On January 21, 1993, the United States Court of Appeals for the Third Circuit denied review of the NLRB's decision in *Consolidation Coal Co. and UMWA* and ordered it enforced. App. 3a-4a. *Consolidation Coal Co. v. NLRB*, 986 F.2d 1408 (3rd Cir. 1993).

REASON FOR DENYING THE WRIT

THE DECISION BELOW, ENFORCING A ROUTINE ORDER OF THE NATIONAL LABOR RELATIONS BOARD, PRESENTS NO CONFLICT WITH THIS COURT'S DECISIONS NOR ANY IMPORTANT QUESTION OF FEDERAL LAW TO BE SETTLED

It is well established that the NLRB possesses primary exclusive jurisdiction over charges that specified behavior constitutes an unfair labor practice. *San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236 (1959). Moreover, an employer commits an unfair labor practice where, as here, it re-

fuses to provide a union information needed for the proper performance of its collective bargaining duties. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-36 (1967).

Consol seeks to obscure the simple, settled and controlling principle of the above cited cases by suggesting that the NLRB did not have authority to direct the production of certain documents because the information involved is 1) arguably relevant only to the issues raised in federal court actions simultaneously being prosecuted by the UMWA under § 301 of the Labor Management Relations Act; and 2) arguably sought for purposes not included within the (UMWA's) statutory duties and responsibilities. "Petition For Writ of Certiorari", dated April 20, 1993, at i.[3]

Through the mist of the Company's obscure presentation of its question there is one issue that can be discerned: whether this Court should vacate the NLRB's determination that the UMWA needed the requested in-

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[3] At pages 27-28 of its petition, the Company comes as close as it will allow itself to stating the issue it seeks to simultaneously present to, and hide from, this Court. There, in concluding its petition, the Company states

> The issue which (the Company) is asking this Court to consider and decide . . . is whether an unfair labor practice has been committed . . . where the information . . . requested by the UMWA . . . (is) for purposes outside the scope of the UMWA's . . . duties.

In so framing the issue, Petitioner demonstrates that this case does not involve an important question of federal law to be settled, for even if the requested information is relevant to a federal court action, that fact would not affect the propriety of the NLRB's determination that the Company was committing an unfair labor practice by refusing to provide the UMWA with that information. Obviously a union's efforts to protect job security provisions of the collective bargaining agreement through the vehicle of the federal courts is well within its duties as the collective bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967).

formation for the proper performance of its duties as the collective bargaining representative.

Now that the issue presented has been discerned, it is clear that Consol does not present this Court with an important question of federal labor law as it contends. *See* "Petition For Writ of Certiorari", dated April 20, 1993, at 12; Supreme Court Rule 10.1(c).[4] Any review of the NLRB's ruling that this Court would perform would be limited to ascertaining whether that ruling has support in the record and a reasonable basis in law. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979). Consol asserts but one reason in support of its conclusion that the NLRB's ruling is baseless: the information requested is irrelevant to determining whether Consol of Pennsylvania and Enlow Fork Mining Company must hire panel employees. This reason misconstrues the parties' collective bargaining agreement.

While admitting that the requested information is relevant to ascertaining whether Consol, Consol of Pennsylvania, and Enlow Fork Mining Company are a single employer, *see* "Petition For Writ of Certiorari", dated April 20, 1993, at 15-16, Consol reasons that since 1)

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[4] The Company's attempt to create an issue out of conflicting orders that may result from a federal action involving the UMWA's access to the requested information fails. *See* "Petition For Writ of Certiorari", dated April 20, 1993, at 21-24. To the extent that an action may give rise to an order that conflicts with the NLRB's order that the Company provide the UMWA with the requested information 1) the district court order would have no effect on the NLRB's order, *see* 29 U.S.C. § 160(a) (NLRB's power to prevent person from engaging in an unfair labor practice "shall not be affected by any means of adjustment or prevention that has been . . . established by . . . law . . . ."); and 2) if any order trumps, it would be the NLRB's. *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 272 (1964).

Consol of Pennsylvania and Enlow Fork are not signatories to the 1988 Collective Bargaining Agreement; and 2) that agreement binds only signatories, that information is irrelevant to determining whether Consol of Pennsylvania and Enlow Fork must hire panel employees as provided by the Agreement. *See* "Petition For Writ of Certiorari", dated April 20, 1993, at 7, 15-16. Consol fails to acknowledge, however, that under the parties' collective bargaining agreement, the first three out of every five jobs at a new company operation shall be filled from the panel lists and:

> Signatory companies and coal producing divisions thereof, and wholly owned and controlled coal producing subsidiaries and wholly owned and controlled coal producing affiliates, shall be treated as one and the same Employer for panel rights purposes.

1988 NBCWA Art. II and Art. XVII (h). Given 1) this agreed-to standard for determining whether an employer must respect employee panel rights; and 2) the Company's admission concerning the requested information's relevance, and 3) the fact that the information request was directed to Consol, a contractual signatory, it is clear that the NLRB's ruling that the information requested is relevant to determining whether Consol of Pennsylvania and Enlow Fork Mining must hire panel employees has ample support in the record and a sound basis in law. The NLRB determined that the information requested was relevant to the underlying grievance over recall rights. The Board further determined that the UMWA needed the information in order to properly perform its duties as the collective bargaining representative. It cannot be contested that the UMWA's collective bargaining responsibilities include assuring that its members receive panel rights benefits, and that such rights may be pursued through the federal courts under § 301 of the Labor Management Relations Act and before the NLRB.

CONCLUSION

The only issue Consol presents is whether there exists in fact and law a reasonable basis for the NLRB's ruling that information requested by the UMWA is relevant to the panel rights grievance giving rise to this lawsuit. As demonstrated above, the NLRB's ruling has ample basis in fact and law, and, as a result, the issue of federal law presented by Consol amounts to nothing more than a lot of sound and fury signifiying nothing. This Court should therefore deny Consol's petition for a writ of certiorari.

Respectfully submitted,

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